IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION	Case No. C 07-5944 SC MDL No. 1917
This Document Relates to: Sharp Elecs. Corp. v. Hitachi, Ltd., No. 13-cv-01173	ORDER GRANTING IN PART AND DENYING IN PART TECHNOLOGIES DISPLAYS AMERICAS, LLC'S MOTION TO DISMISS SHARP'S FIRST AMENDED COMPLAINT

I. INTRODUCTION

Now before the Court is Defendant Technologies Displays Americas, LLC's ("TDA" or "Defendant") motion to dismiss Sharp's[1] first amended complaint. ECF Nos. 2234 ("MTD"), 2030 ("FAC") (filed under seal). The matter is fully briefed, ECF Nos. 2280 ("Opp'n"), 2318 ("Reply"), and appropriate for decision without oral argument, per Civil Local Rule 7-1(b). As explained below, the Court GRANTS in part and DENIES in part the motion.

[1] "Sharp" collectively includes Sharp Electronics Corporation ("SEC") and Sharp Electronics Manufacturing Company of America, Inc. ("SEMA").

II. BACKGROUND

The parties are familiar with this case's facts. Accordingly, the Court will only summarize some of the facts that are relevant to the instant motion

The underlying antitrust conspiracy in this MDL -- to fix prices of cathode ray tubes ("CRTs"), including color picture tubes ("CPTs"), and products containing CRTs ("CRT Products") -- is alleged to have lasted between March 1, 1995 and December 2007 (the "Relevant Period"). The plaintiffs in all of this MDL's cases contend that the defendants kept the conspiracy secret, in order to avoid putting the plaintiffs (and anyone else) on notice. But on November 8, 2007, the European Commission ("EC") issued a press release stating that its officials had raided several unnamed CRT manufacturers. Shortly thereafter, other countries' law enforcement agencies conducted similar raids, and within a few weeks, Defendants Panasonic, Samsung SDI, and Philips all acknowledged that they were under investigation.

Sharp filed an individual complaint on March 15, 2013, opting out of the putative DPP class. Sharp's complaint asserts claims under Section 1 of the Sherman Act, 15 U.S.C. et seq.; the California Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq.; the California UCL, Cal. Bus. & Prof. Code § 17200 et seq.; New York's Donnelly Act, N.Y. Gen. Bus. L. § 340 et seq.; the New York UCL, N.Y. Gen. Bus. L. § 349 et seq.; the New Jersey Antitrust Act, N.J. Stat. § 56:9-1 et seq.; and the Tennessee Antitrust Act, Tenn. Code Ann. § 47-25-101 et seq.

Sharp's complaint alleges the following facts about TDA specifically, and the Court takes them as true at this time.

Before 2005, TDA was known as "Thomson Displays America" and was a subsidiary of Defendant Thomson Consumer Electronics, Inc. ("Thomson Consumer"). FAC ¶ 72. In 2005, Videocon Industries, Inc. ("Videocon") acquired the CRT business of Defendants Thomson Consumer and Thomson SA (collectively "Thomson"), though Thomson SA allegedly maintained at least a 10 percent ownership stake in Videocon during the conspiracy period. Id. 197. Thomson is alleged to have been involved in the conspiracy between 1999 and Videocon's acquisition of the Thomson CRT business in 2005. Id. ¶ 199. Between 2005 and 2007, Videocon participated in several conspiracy-related meetings, continuing Thomson's practice, though Sharp alleges that Thomson remained involved in the conspiracy through Videocon and TDA. Id. ¶¶ 198.

TDA was responsible for Videocon's sales and marketing of CRT Products in North America, and Sharp alleges on information and belief that Videocon dominated or controlled TDA's policies and affairs, and directed TDA's pricing of CRT Products. Id. ¶ 199. Sealed facts indicate that at least two former Thomson employees who had previously attended conspiracy meetings then began working for TDA, while Videocon continued to participate in conspiratorial information sharing and meetings. Id. Under Videocon's direction, TDA and its Mexican subsidiary and co-conspirator Technologies Displays Mexicana distributed CRTs to direct purchasers, ensuring that the prices for those products did not undercut the pricing agreements reached at the conspiratorial meetings. Id. ¶ 200.

All of Sharp's claims are subject to four-year statutes of limitations, except the New York UCL and the Tennessee Antitrust Act, which have three-year statutes of limitations. TDA now moves

to dismiss Sharp's FAC.

III. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 664 (2009). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 678 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The allegations made in a complaint must be both "sufficiently detailed to give fair notice to the opposing party of the nature of the claim so that the party may effectively defend against it" and "sufficiently plausible" such that "it is not unfair to require the opposing party to be subjected to the expense of discovery." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

Claims sounding in fraud are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which requires that a plaintiff alleging fraud "must state with particularity the circumstances constituting fraud." See Kearns v.

Ford Motor Co., 567 F.3d 1120, 1124 (9th Cir. 2009). "To satisfy Rule 9(b), a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about [the purportedly fraudulent] statement, and why it is false." United States ex rel Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (internal quotation marks and citations omitted).

IV. DISCUSSION

A. Whether Sharp Adequately Pled a Claim Against TDA

TDA argues that Sharp's complaint is purely speculative and insufficient to meet Rule 8's plausibility standard. MTD at 3. According to TDA, Sharp fails to plead enough detail about TDA's alleged involvement in the conspiracy, despite having the benefit of the Court's prior order on Sharp's pleading in a different case. Id. (citing ECF No. 1960 ("Order Granting Thomson MTD")). TDA contends that Sharp never alleges what TDA agreed to do, or did, in furtherance of the alleged conspiracy, such as attending specific meetings. Further, TDA states that alleging a parent-subsidiary relationship, without more, is not enough to make TDA liable for the torts of any of its affiliates -- mere corporate status is insufficient. Finally, TDA argues that its sale of CRTs does not automatically make it a co-conspirator, nor does it show that TDA was at any of the alleged conspiratorial meetings. All of these, TDA claims, render Sharp's allegations implausible.

Rule 8 demands "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 556 U.S. at 678. But the Court finds that Sharp has alleged enough specifics as to TDA to

warrant its pleadings surviving a motion to dismiss, particularly given the Court's frequent statements that plaintiffs in complex, multinational antitrust cases do not have to plead detailed, defendant-by-defendant allegations -- they only have to make allegations plausibly suggesting that each defendant participated in the conspiracy. See In re Cathode Ray Tube (CRT) Antitrust Litig., 738 F. Supp. 2d 1011, 1019 (N.D. Cal. 2010); In re TFT-LCD (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179, 1184-85 (N.D. Cal. 2009). The Court has dismissed claims against certain defendants in this action because plaintiffs had essentially copied other pleadings and, in responsive briefs to motions to dismiss, defended their allegations' paucity of facts by comparing their complaints to the much-older pleadings the Court had held sufficient to survive a Rule 12(b)(6) motion, instead of referring to their own pleadings. See Sept. 26 Order at 5.

That reasoning still stands, but the Court does not find that Sharp has slipped below the pleading requirements set by Rule 8. Sharp's complaint does not set out elaborate fact pleading that explains every step Sharp contends TDA to have taken, but it does not have to go that far. In complex antitrust litigation, motive and intent play leading roles, and the proof is largely in the alleged conspirators' hands. Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962). Accordingly, pleadings must be plausible, but they do not have to be in the form of precisely detailed, defendant-by-defendant allegations. In re CRT, 738 F. Supp. 2d at 1017.

Sharp has pled that this particular conspiracy is structured in such a way that its allegations about TDA's business and

behavior make sense in terms of adequately stating TDA's involvement and putting it on notice of Sharp's claims against it. Sharp does not plead dates on which TDA is alleged to have attended conspiratorial meetings, but Sharp does plead that Videocon, which allegedly did attend those meetings, dominated and controlled TDA, and that executives who attended price-fixing meetings worked for Videocon and TDA. These pleadings are sufficient. And while Sharp has apparently obtained written discovery responses from TDA, no depositions have been taken and only a "small number of documents" have been provided. See Opp'n at 11 n.4. TDA is very new to this litigation and has not been involved in any capacity, unlike, for example, the Thomson Defendants. This puts Sharp's pleadings in a different posture, though the pleadings that are on the record rise above being mere labels and conclusions.

B. Statutes of Limitation

The doctrine of fraudulent concealment focuses on actions that a defendant took to prevent a plaintiff from learning of grounds for filing a suit. See Lukovsky v. City & Cnty. of S.F., 535 F.3d 1044, 1051 (9th Cir. 2008). To invoke the doctrine, plaintiffs must allege facts demonstrating that they could not have discovered the alleged violations by exercising reasonable diligence. Rosenfeld v. JPMorgan Chase Bank N.A., 732 F. Supp. 2d 952, 964 (N.D. Cal. 2010); see also Hubbard v. Fid. Fed. Bank, 91 F.3d 75, 79 (9th Cir. 1996). A fraudulent concealment claim must be alleged with particularity under Rule 9(b). Noll v. eBay, Inc., 282 F.R.D. 462, 468 (N.D. Cal. 2012).

TDA notes that one of Sharp's earlier briefs concedes that Sharp can only assert fraudulent concealment through November 2007.

MTD at 8 n.4 (citing ECF No. 2194). However, TDA contends that even if Sharp could plead concealment, the ground for tolling would be inapplicable because Sharp's complaint was filed outside the limitations periods even if its claims were tolled through November 2007. Id. Sharp views this statement as TDA's conceding that Sharp's allegations show fraudulent concealment through November 2007, Opp'n at 15, though TDA maintains that Sharp's complaint simply lacks any facts supporting fraudulent concealment on TDA's part, Reply at 5.

The Court finds that Sharp's complaint has sufficiently pled fraudulent concealment until November 14, 2007, the latest date this Court has held to provide actual or inquiry notice to the DAPs. See In re Cathode Ray Tube (CRT) Antitrust Litig., No. C-07-5944, 2013 WL 4505701, at *3 (N.D. Cal. Aug. 21, 2013); see also In re Rubber Chems. Antitrust Litig., 504 F. Supp. 2d 777, 789 (N.D. Cal. 2007) ("[I]t is generally inappropriate to resolve the fact-intensive allegations of fraudulent concealment at the motion to dismiss stage, particularly where the proof relating to the extent of the fraudulent concealment is alleged to be largely in the hands of the alleged conspirators."). This renders their claims time-barred unless they are able to invoke a tolling doctrine or some equivalent that would cover the time period from November 14, 2007 to the filing of the present complaint.

To overcome this deficiency, Sharp asserts (1) tolling based on American Pipe and similar class-action tolling doctrines, and (2) the pendency of criminal proceedings and investigations against several Defendants and co-conspirators.

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i. American Pipe Tolling

American Pipe held that commencement of a class action suspends the statute of limitation as to all putative members of the class up to and until class certification is denied or the plaintiff opts out of the class. 414 U.S. at 554; Williams v. Boeing Co., 517 F.3d 1120, 1136 (9th Cir. 2008); Emp'rs-Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors, 498 F.3d 920, 925 (9th Cir. 2007). "Tolling is fair in such a case because when the complaint is filed defendants have notice of the 'substantive claims being brought against them.'" Williams, 517 F.3d at 1136 (quoting Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352-53 (1983)).

TDA was not a defendant in any of the previously filed cases. This alone is enough for the Court to hold American Pipe tolling inapplicable in this case. See Biotech. Value Fund, L.P. v. Celera Corp., -- F. Supp. 2d --, 2013 WL 6731900, at *8 (N.D. Cal. Dec. 20, 2013) (not applying American Pipe to a defendant not named in any putative class action); Tech Data Corp. v. AU Optronics Corp., No. 07-MD-1827, 2012 WL 3236065, at *5 (N.D. Cal. Aug. 6, 2012) (same). Sharp argues that the Court should apply American Pipe tolling anyway, because there is "at least a fact question as to whether TDA was on notice of the claims sufficient to trigger American Pipe tolling." Opp'n at 21. Sharp cites no binding law to support its point. The Court does not find Sharp's arguments convincing. There is no authority behind the contention that the Court could or should apply American Pipe to toll claims against a

party not named as a defendant in any case that could toll an action.[2]

ii. Governmental Action

a. New York

Sharp argues that the federal government's actions on the CRT conspiracy toll the statute of limitations for its Donnelly Act claims, beginning with the DOJ's criminal actions against CRT conspirators in February 2009. Sharp Opp'n at 11-12. They base this argument not on federal antitrust tolling provisions, but on the Donnelly Act's own tolling provision, which tolls Donnelly Act limitations periods pending federal antitrust proceedings:

> Whenever any civil or criminal proceeding is instituted by the federal government to prevent, restrain, or punish violations of the federal antitrust laws, the running of the period of limitations in respect of every right of action arising under sections three hundred forty, three hundred forty-two and three hundred forty-two-a of this article, based in whole or in part on any matter complained of in the federal proceeding, shall be suspended during the pendency of said proceeding and for one year thereafter . . . .

N.Y. Gen. Bus. Law § 342-c. Sharp further notes that, elsewhere in this litigation, Defendants have conceded that Donnelly Act claims are tolled due to pending federal investigations. Opp'n at 12 (citing ECF No. 1422 ("Defs. Joint Reply ISO MTD DAP Claims")).

Defendants contend that their earlier motion was directed toward other DAPs, whose complaints were filed in November 2011. Reply at 15. They also argue that the New York tolling provision does not save Sharp's claim. Id. at 14-15. According to Defendants, tolling under that statute commences only as of the

[2] Even if American Pipe applied, as explained in the concurrently filed Order on Defendants' Joint Motion to Dismiss, it would not toll any of Sharp's state law claims.

date an indictment was filed, and lasts through the pendency of prosecution. Id. at 15 (citing Hinds Cnty., Miss. v. Wachovia Bank N.A., 885 F. Supp. 2d 617, 628 (S.D.N.Y. 2012) (applying tolling under the federal provision, not Section 342-c); Dungan v. Morgan Drive-Away, Inc., 570 F.2d 867, 871 (9th Cir. 1978) (same)). Defendants claim that because Sharp has alleged nothing as to the duration of any criminal proceedings, except fifty-five days between March 18, 2011 and May 12, 2011 when two defendants entered plea agreements, there is no way for Sharp to account for the period between November 2007 and March 2013. Id.

The Court is not convinced by Defendants' argument. The Court finds that § 16(i) tolling applies based on the open indictments in this case. For 15 U.S.C. § 16(i) to apply, a plaintiff must show by a "comparison of the two complaints on their face[s]" that there is a significant overlap between the two actions, such "that the matters complained of in the government suit bear a real relation to the private plaintiff's claim for relief." Leh v. Gen. Petro. Grp., 382 U.S. 54, 59 (1965). The Court finds accordingly here: the conspiracy is the same, many of the actors are the same, and the cases will share many facts. They overlap significantly, and the government's cases bear real relations to Sharp's case. Id.

First, one criminal matter, pending between March 18, 2011 until its closure in August 30, 2012, tolls claims under § 16(i) for that time period plus a year. Further, based on J.M. Dungan v. Morgan Drive-Away, Inc., 570 F.2d 867 (9th Cir. 1978), tolling under § 16(i) begins at least at the indictment stage, though the Court notes that Dungan had the benefit of at least one completed criminal case. However, the Ninth Circuit's holding was in fact

based on the theory that the return of a grand jury indictment fits the statutory language of § 16(i) more comfortably than empanelling alone would, since the purpose of an indictment is the prevention, restraint, or punishment of antitrust violations. In this case, the open indictments Sharp references remain pending, and the Court finds Dungan instructive here: tolling under § 16(i) may begin at least with the return of an indictment, and absent facts or law indicating that the Court cannot apply tolling because not much has happened in those cases, the Court finds that under current precedent tolling will apply from February 10, 2009 to the present as to Sharp's Donnelly Act claims.

V. CONCLUSION

As explained above, Sharp's state law claims are DISMISSED WITH PREJUDICE, with the exception of Sharp's Donnelly Act claims. All federal claims are undisturbed.

IT IS SO ORDERED.

Dated: March 13, 2014

UNITED STATES DISTRICT JUDGE